



Memorandum

Date: March 2, 1999

To: CALFED Policy Group

From: Lester A. Snow *Manuel*

Subject: Update on Clean Water Act Sec. 404: MOA, Issues, Management Level Workgroup

Summary

CALFED agencies have proposed a memorandum of agreement among the Corps, USEPA, and other appropriate CALFED agencies describing a Section 404 programmatic compliance strategy. The CALFED Revised Phase II Report dated December 18, 1998 set the context for the MOA and outlined the following proposed elements:

- Performance criteria for alternatives to surface storage
- Commitment to full implementation of the performance criteria
- A framework establishing the scope of subsequent project level analysis for 404, and
- Identification of other procedures needed to comply with the 404 permitting process.

Additional work by CALFED staff has resulted in a more comprehensive and detailed list of elements that might be considered for inclusion in this MOA. These elements will be the subject of discussion and negotiation among CALFED agencies; at this time there may not be agreement among the agencies even on the list of potential elements. The potential elements that might be considered include agreement on:

1. CALFED public interest and beneficial effects
2. Integrated nature of program
3. Design and results of a programmatic surface storage needs analysis
4. Performance measures for selected water management tools
5. Concurrent and sequential activities in Phase III
6. Programmatic aspects of changes in Delta conveyance
7. Surface storage facilities screening process and short list

CALFED Agencies

California
The Resources Agency
Department of Fish and Game
Department of Water Resources
California Environmental Protection Agency
State Water Resources Control Board

Federal
Environmental Protection Agency
Department of the Interior
Fish and Wildlife Service
Bureau of Reclamation
U.S. Army Corps of Engineers

Department of Agriculture
Natural Resources Conservation Service
Department of Commerce
National Marine Fisheries Service

8. Identification of an expedited Corps "elevation process"
9. Extension of one-year limit on commencing projects
10. Commitment to expeditious review of permit applications

Several potential 404 issues have been identified by staff of the CALFED agencies. It will be important to address these issues early so that all issues are resolved in a timely way. Some identified issues include:

1. Selection of the LEDPA for Delta conveyance
2. Planning for storage identified in Needs Analysis
3. Application of the principle of "beneficiaries pay"
4. Mitigation for project level impacts

An important part of issue resolution could be a Washington D.C. based workgroup composed of representatives of key CALFED agencies involved in 404 issues. The formation of such a workgroup would help keep management in Washington informed so that questions and problems could be elevated and resolved quickly.

Potential elements of the MOA, possible issues, and the management level workgroup are described in greater detail below.

Elements of the Memorandum of Agreement

- 1. CALFED public interest and beneficial effects.** The MOA will reiterate the fundamental programmatic determination that the CALFED program is in the public interest, and that its beneficial effects outweigh its detrimental effects.
- 2. Integrated nature of program.** The MOA will reiterate recognition of the integrated and interrelated nature of individual projects in the CALFED program.
- 3. Design and results of a programmatic surface storage needs analysis.** This needs analysis will draw upon CALFED's water management strategy, outlining the role of water management tools including water conservation, water recycling, water transfers, watershed management, water quality control, groundwater/conjunctive use, facility reoperation, and cost allocation. The needs analysis will determine the extent to which new or expanded surface storage needs to be developed to meet CALFED objectives.

The regulatory presumption under the Section 404 Guidelines is that there is a less environmentally damaging practicable alternative to constructing new facilities which may impact Waters of the United States, including streams, wetlands, and special aquatic sites. The overall storage strategy will describe whether or not all practicable alternatives to storage facilities have been implemented to the extent feasible and whether there is still an unmet need for additional storage facilities when beneficiaries pay the full cost of new facilities. This effort will be coordinated with the overall CALFED 404 process.

4. Performance measures for selected water management tools. Performance measures will be defined very precisely so that achievement of these performance measures is clear and unambiguous. The nature of the performance measures may vary among the water management tools: for different water management tools, the performance measures could be expressed as funding levels, or creation of particular institutions, or implementation of specific actions.

5. Concurrent and sequential activities in Phase III. Implementation of several water management tools other than new or expanded surface storage will occur concurrently during Phase III to achieve performance measures. Reservoir feasibility and environmental studies will also proceed concurrently. Final permitting and construction will only occur after achievement of specified performance measures as determined by an accepted monitoring program.

6. Programmatic aspects of changes in Delta conveyance. Permitting for projects to modify Delta conveyance will proceed in two steps: programmatic concurrence that CALFED has selected the least environmentally damaging practicable alternative among three broad conveyance alternatives, and subsequent project-level permitting. Programmatic concurrence will be included in the MOA.

7. Surface storage facilities screening process and short list. Timely implementation of any permitted surface storage will require that feasibility and environmental studies proceed while other water management tools are being implemented early in Phase III.

8. Identification of an expedited Corps "elevation process". An expedited Corps elevation process will be necessary so that important policy-level disputes may be resolved in a timely manner. This will help ensure that related bundles of actions can proceed concurrently during program implementation.

9. Extension of one-year limit on commencing projects. Corps regulations state that the normal time period between permit approval and project commencement is one year or less. The MOA will recognize that concurrent review of related projects may result in longer time periods before some projects are initiated.

10. Commitment to expeditious review of permit applications. The need for permitting of numerous CALFED projects will make it important to streamline the process whenever possible, through the use of nationwide permits, general permits, and other appropriate ways.

Possible Issues

1. Selection of the LEDPA for Delta conveyance. CALFED's draft preferred program alternative includes development of through-Delta conveyance based on the existing Delta configuration with some modifications, evaluation of its effectiveness, and addition of additional conveyance and/or other water management actions if necessary to achieve CALFED goals and objectives. CALFED will need to demonstrate that this alternative is the least environmentally damaging practicable alternative when all the evidence and uncertainty is considered. It will be important for CALFED to work with regulatory agencies so that CALFED amasses an adequate administrative record and regulatory agencies interpret this record appropriately.

2. Planning for storage identified in Needs Analysis. The MOA is expected to document an agreement that permits for any surface storage projects will not be issued until alternatives to surface storage are pursued to practicable levels. Agreement will need to be reached on the level of planning for storage that can occur while other alternatives are being implemented.

3. Application of principle of "beneficiaries pay." CALFED has endorsed this principle, but agreement on details will be difficult to achieve, particularly as it relates to baseline water deliveries and pricing of "new" versus "old" water.

4. Mitigation for project level impacts. The CALFED program will result in net environmental benefits. It will be necessary to mitigate for certain site-specific environmental impacts associated with particular projects, but CALFED agencies must reach agreement on appropriate types and levels of mitigation considering the comprehensive beneficial nature of the program.

Management Level Workgroup on CWA Sec. 404 Programmatic Compliance Issues

Concept:

A Washington D.C. based workgroup composed of representatives of key CALFED agencies involved in 404 issues.

Purpose:

Keep management in Washington D.C. informed regarding CALFED 404 programmatic compliance progress and issues so that questions or problems can be elevated and resolved quickly.

Need:

A programmatic compliance strategy embodied in a memorandum of agreement among CALFED agencies could be a very powerful assurance mechanism and a constructive way to bring stakeholders together on issues such as agricultural water conservation. However, it will be difficult to reach consensus on persistent issues by the time a ROD is issued, and it will be important for Washington D.C. level management to understand areas of agreement and disagreement as the program proceeds.

Agencies:

Agencies on the workgroup will be USEPA and the Corps due to their regulatory role in the 404 process. Interior should be included as well, representing other CALFED agencies that have program and funding responsibilities such as the Bureau of Reclamation.